Nos. 15,959 and 15,960

IN THE

United States Court of Appeals

For the Ninth Circuit

CHENG FU SHENG and LIN FU MEI,
Appellants,

vs.

BRUCE G. BARBER, District Director, Immigration and Naturalization Service,
Appellee.

On Appeal from the United States District Court for the Northern District of California, Southern Division.

REPLY BRIEF FOR APPELLANTS.

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REPLY BRIEF FOR APPELLANTS.

I. WHAT IS MEANT BY "COUNTRY" AS USED IN SECTION 6?

The main contention made in appellee's brief is that the word "country" within Section 6 of the Act refers to a governmental entity rather than a place or geographical area. Appellee proceeds to the conclusion that Formosa, which is controlled by the Republic of China is the "country" of appellants' "birth", "nationality" and "last residence" within the meaning of the Act.

The validity of appellee's contention would appear to depend, in part at least, upon the accuracy of his

assertion that Formosa (Taiwan) has been a part of China from the time of appellants' birth to the present. No authority is furnished by appellee in support of the statement at page 19 of his brief that:

> "The appellants were born within the geographical area which they call 'China' at a time when that area was controlled, or governed, by a sovereign entity identified as the 'Chinese Nationalist Government'. *The said area called 'China' or 'The Republic of China' also included the island called 'Formosa' or 'Taiwan'.*" (Emphasis supplied.)

According to the Encyclopedia Britannica, Formosa was a part of Japan from 1895 until 1945.

> "In 1895 the island was ceded to Japan by the treaty of Shimonoseki.
>
> * * * * * * *
>
> As a result of a decision reached at the Cairo Conference in November 1943, [Formosa] was formally surrendered to China on Oct. 25, 1945."
>
> *Encyclopedia Britannica,* Vol. 9 p. 520 et seq. (1957 Ed.)

Thus, it is apparent that the area called "China" or the "Republic of China" did not include the island of "Formosa" at the time of appellants' birth, as asserted in appellee's brief.

Even if the factual basis for appellee's argument were accurate, we do not believe that the conclusion reached would be sound. This is the first time this contention has been advanced in either the administrative or judicial proceedings relating to the appel-

lants. For that matter, counsel knows of no other Section 6 case where such an argument has been made by the government.

It is evident from the Court's decision in *Chien Fan Chu v. Brownell,* 247 F. 2d 790, that the government did not present such an argument, though the pertinent facts in that case were essentially similar to those in the instant case. Nor was this argument advanced in the case of General Li Tsung Jen, who entered the United States for medical treatment when he was Acting President of Formosa and thereafter applied for adjustment of status pursuant to Section 6 of the Act. Counsel, by letter dated July 16, 1957, addressed to the District Court, called attention to the fact that Congress approved the applications of General Li (0300-469349) and his wife, Li-Te-Shieh Kuo (A10245429), on July 2, 1957, by House Congressional Resolution No. 194, the Senate concurring. Furthermore, we have represented a substantial number of Chinese persons whose Section 6 applications were approved by both the Immigration Service and Congress. In no instance has the government attempted to equate "country" with governmental entity, thus, requiring the applicant to establish inability to return to Formosa.

A history of consistent administrative action should be accorded great weight and the particular practice should not be disturbed lightly unless clearly erroneous.

Costanzo v. Tillinghast, 287 U.S. 341;
Lucas v. American Code Co., 280 U.S. 445.

There could be no clearer indication that Congress intended "country", as used in Section 6, to mean territory than that body's approval of countless Section 6 applications involving Chinese persons without requiring proof of the applicants' inability to return to Formosa.

Appellee's argument rests primarily upon cases interpreting the phrase "country whence they came" contained in statutes providing for the deportation of aliens. *Mensevich v. Tod,* 264 U.S. 134, relied upon by appellee, does not appear to support his position. In that case, the alien came to the United States from Grodno, then a part of Russia. At the time of deportation in 1924, Grodno had become a part of Poland as officially recognized by the United States. The Supreme Court held that the alien could properly be deported to Poland, stating, at page 137:

> "The validity of a detention questioned by a petition for habeas corpus is to be determined by the condition existing at the time of the final decision thereon. *Stallings v. Spain,* 253 U.S. 339, 343, 40 Sup. Ct. 537, 64 L. Ed. 940. Deportation to Poland is now legal."

In authorizing the alien's deportation to Poland, the Supreme Court evidently took the view that "country" means territory rather than governmental entity.

This Court has had occasion to construe the phrase "country whence they came" in at least two cases. In *Seif v. Nagle,* 14 F. 2d 416, the alien entered the United States in 1903, coming from Galicia, then a part of Austria. Galicia became a part of Poland after

World War II and the alien contended that it was erroneous to require his deportation to Poland. This Court rejected the alien's contention, relying upon *Mensevich v. Tod,* supra. In *Caranica v. Nagle,* 28 F. 2d 955, the alien had come to the United States from Macedonia, then a part of the Turkish Empire, but at the time of deportation a part of the Greek Republic. This Court held that the alien could properly be deported to Greece.

In the final analysis, appellee's argument rests upon two cases, *U. S. ex rel. Milanovic v. Murff,* 253 F. 2d 941 (C.C.A. 2) and *Delany v. Moraitis,* 136 F. 2d 129 (C.C.A. 4). Both cases appear to be inconsistent with the decisions of this Court cited above and the decision of the United States Supreme Court in *Mensevich v. Tod,* supra. In the *Delany* case, the Court was cognizant of the fact that "country" ordinarily means territory, but justified its departure from the plain meaning of the word at page 131, as follows:

> "The purpose of the deportation statute with which we are dealing is to remove from this country an alien who is here contrary to our laws, and place him under the jurisdiction of the political power to which he owes allegiance. If the word 'country' as used in the statute be construed to include the government in exile of a country whose territory has been overrun by the common enemy, the purpose of the statute can be carried out and the alien placed under the jurisdiction of the country to which he owes allegiance and which is charged with his protection. If it be construed as limited to the territory of the nation,

> which has been thus overrun, the purpose of the statute will be frustrated in cases of this sort; and it will result either that we must suffer an alien who has come from such a country to remain at large in our country contrary to our laws or must support him in prison until such time as he can be returned to the territory now in possession of the enemy. We do not think that any such absurd result could have been within the contemplation of Congress in the passage of the Act; *and it is well settled that statutes should be construed, if possible, so as to effectuate the purpose intended and avoid absurd consequences.... It will always, therefore, be presumed that the legislature intended exceptions to its language, which would avoid results of this character.*" (Emphasis supplied.)

In the *Delany* case, the unusual meaning attached to the word "country" may have been warranted, inasmuch as the Court was concerned with arriving at an interpretation which would enable the administrative agencies of our government to effect the alien's deportation. Since deportation is dependent upon the existence of a receiving *government* with which the United States has diplomatic relations, it was necessary to equate "country" with "government" in order to effectuate the terms of the statute. In the instant case, we are not concerned with the interpretation of a deportation statute, so neither the *Milanovic* case nor the *Delany* case are applicable. We are dealing here with a statute enacted for the purpose of granting permanent residence status to aliens who are unable to return to their usual *place* of abode

because that *place* is now under the control of a dictatorial government. In construing Section 6 of the Act there is no reason to depart from the plain meaning of the word "country". To do so would lead to absurd results.

Looking at the Act itself, it becomes clear that Congress intended "country" to be synonymous with place or geographical area. Section 6 of the Act was designed to extend benefits to alien refugees within the United States on a somewhat equivalent basis with those provided to alien refugees abroad. Although the requirements for eligibility differ in the case of an alien within the United States, an examination of the provisions relating to aliens abroad furnishes insight as to the intention of Congress by its use of the word "country" within Section 6. Under definitions, 50 U.S.C.A. Appendix 1971 provides:

> "(a) 'Refugee' means any person in a *country or area* which is neither Communist, nor Communist-dominated, who because of persecution, fear of persecution, natural calamity or military operations is out of his *usual place of abode and unable to return thereto. . . .*" (Emphasis supplied.)

In defining "Escapee" in sub-section (b) of 50 U.S.C.A. Appendix 1971, Congress referred to "Communist-dominated or Communist-occupied area of Europe." And in defining "German expellee" in subsection (c) of 50 U.S.C.A. Appendix 1971, Congress referred to "areas provisionally under the administration or control or domination of any such countries." The use of "country" interchangeably with "geo-

graphical area" in the above portions of the Act clearly indicates that Congress intended "country" as used in Section 6 of the Act to mean geographical area.

We submit that there is no doubt that Congress intended "country", within Section 6 of the Act, to be given its ordinary meaning, geographical area, rather than governmental entity as urged by appellee.

II. DOES FAILURE TO MAINTAIN STATUS RENDER APPELLANTS INELIGIBLE FOR RELIEF?

The sole authority cited by appellee in support of the District Court's second conclusion of law is the decision of the United States Court of Appeals for the Seventh Circuit in *Wei v. Robinson,* 246 F. 2d 739. We completely agree with the holding of that Court and those portions of its decision quoted at pages 21 and 22 of appellee's brief. However, we fail to see any connection between that case and the instant case. The *Wei* case dealt solely with the issue of deportability, holding that the failure of a non-immigrant alien to maintain status renders him deportable under either the 1924 Act or the 1952 Act. *The Wei case did not consider the alien's eligibility for relief under Section 6 of the Refugee Relief Act of 1953, as amended, which is the issue in the case at bar.*

We can find nothing in the statute involved, regulations thereunder, or reported decisions tending to support the District Court's second conclusion of law:

> "Upon the termination of his status as a bona fide non-immigrant within the meaning of Section

6 of the Refugee Relief Act, petitioner became ineligible for the benefits of that Act."

III. CONCLUSION.

The language quoted at pages 22 and 23 of appellee's brief from *Yee Si v. Boyd,* 243 F. 2d 203, and the *Wei* case is hardly applicable to this case. Neither the *Yee* nor *Wei* cases involve judicial review of an administrative decision denying an application for relief provided for by an Act of Congress. Appellee, by his use of the quotations referred to above, appears to have overlooked the fact that appellants have filed applications under Section 6 and that they believe, in good faith, that they are eligible for the benefits of Section 6. Indeed, the District Court in its previous decision, 146 F. Supp. 913, held that appellants were so eligible.

If anyone has played "ducks and drakes with the laws and the Courts of the United States" it is the government. The appellants' applications under Section 6 have been denied by the government on every conceivable pretext, thus, preventing the applications from being considered by Congress.

We respectfully submit that the judgment of the District Court should be reversed.

Dated, San Francisco, California,
July 7, 1959.

FALLON AND HARGREAVES,
Attorneys for Appellants.